OGC HAS REVIEWED.

Deputy Comptroller

3 August 1951

Office of the General Counsel

Commencement of Salary for New Overseas Appointees

1. Reference is made to the memorandum from the Chief, Audit Division, to your office, dated 5 May 1951, concerning the effective date for commencement of salary payments to new overseas appointees. Many appointees are required to report to Washington prior to commencement of travel overseas, and a ruling has been requested as to whether it is mandatory or permissive to start salary payments on the date travel commences.

2. In connection with our discussion of the purely legal aspects of this problem, we believe you may be interested in a proposed law which is now under consideration by Congress. The Department of the Navy now pays compensation to its overseas civilian appointees, "from the date of their sailing from the United States," rather than from the date they begin travel from their homes. The Navy's practice is based upon a 1902 statute applicable only to the Navy, from which the above quotation has been taken (34 USCA 506). Consequently, while most overseas appointees of the Government are being paid compensation from the date they leave their homes, Navy employees must wait until their sailing date.

3. The Navy's dissatisfaction with the above situation has culminated in its recommendation that the 1902 statute be repealed, and Senate Bill 1829 has been introduced for this purpose. The theory behind S. 1829 is that repeal of the 1902 statute will allow the Navy to operate under the provisions of Section 7 of Public Law 600 (79th Congress), and consequently to pay overseas appointees from the date they leave their homes.

4. The proposed legislation is now being considered by the Senate Committee on Post Office and Civil Service, and that body recently requested the Comptroller General's opinion of S. 1829. The Comptroller General's reply to Senator Olin D. Johnston, dated 27 July 1951, was generally in favor of the bill, and after a brief discussion of this problem, the following pertinent language was used:

> "The retention of the subject statutory provisions [34 USCA 506] would continue in existence an inequitable restriction upon civilian appointees of the Department of the Navy" (emphasis added).

This pointed comment of the Comptroller General will carry great weight in the consideration of S. 1029, which already has the strong backing of the Department of Defense. It is safe, therefore, to predict passage of this bill.

5. Perhaps, in view of the above situation, it would be advisable for this Agency to give pause before withholding certain benefits from its appointees, particularly when another Government department is fighting (with the Comptroller General's support) to obtain the same benefits for its appointees.

6. If CIA were to adopt a policy of requiring new overseas appointees to enter on duty in Washington before they could receive compensation, it is probable that no serious difficulties would arise unless an appointee brought suit in the Court of Claims. In the event of such a suit, there is some doubt as to whether the appointee could obtain a judgment entitling him to compensation for the time spent in travel to Washington. This doubt arises from an interpretation of the Comptroller General's decision of 14 November 1944 (24 Comp. Gen. 391, at 394), which was based upon a statute authorising traveling expenses for appointees from point of induction to first post of duty overseas. The Comptroller General, in permitting the commencement of salary at the time of commencement of travel from point of induction, stated that, "it reasonably may be inferred that Congress intended to create a duty status" from that time.

7. Section 7 of Public Law 600, which contains specific authority for CIA to pay travel expenses of new appointees, contains language almost identical with that of the statute involved in 24 Comp. Gen. 391. Consequently, a similar ruling would be possible if the issue were presented to the Comptroller General today. However, there is some doubt as to the mandatory or permissive nature of 24 Comp. Gen. 391, even in GAO, particularly as it would apply to an agency with such broad powers as CIA. If a change in policy is deemed necessary, it may be advisable to submit the problem to the Comptroller General for a formal ruling, even though such a ruling would not necessarily be binding on the Court of Claims.

8. Another question has been asked regarding the legal relationship between the appointee and CIA during travel, if salary payments do not start until entrance upon duty in Washington. The question primarily concerns the possibility of injury or death of the appointee en route to Washington. In order for the Government to pay compensation for an individual's injury or death, there are two requisites: (1) the individual must be an employee, and (2) he must have been injured or killed "while in the performance of duty."

In order for an individual to be considered an "employee," entitlement to salary is usually necessary. Consequently, it is possible that a new appointee en route to Washington, and not receiving salary, would not be classed as an "employee," in contemplation of the Federal Employees' Compensation Act. However, the FECA also provides that the term "employee" shall include persons rendering service without compensation in any case in which an Act of Congress provides for the payment of travel expenses for such persons. Since Section 7 of Public Law 600 provides for the payment of travel expenses for new appointees, it is clearly possible that they may be classed as "employees" even though not in receipt of salary. In the event of any accident, a final decision in this matter will be made by the Bureau of Employees' Compensation, but it is our opinion that BEC would consider such appointees as "employees" within the contemplation of FECA.

9. Whether an injury en route to Washington would be considered as sustained in the performance of duty is also, in the final analysis, a decision for BEC to make on the basis of all the facts surrounding the case. BEC has a general policy of following and adhering to the principles of workmen's compensation laws as stated in the opinions of the Supreme Court, the Federal Circuit Courts of Appeal, and the District Courts of the United States, as they may appropriately be applied in like situations arising under the laws administered by BEC. The liberal trend of the courts in the interpretation of workmen's compensation laws is well recognized and the courts seem inclined to interpret such laws in a manner most favorable to the employee. Consequently, it is our prediction that BEC would consider an injury or death of a new appointee as compensable. The constant state of flux of judicial interpretation precludes the possibility of a definitive answer, but the almost constant trend in favor of employees is the basis for our prediction. If such a case were presented to BEC at the present time, we have been informed that such an appointee probably would receive compensation for his injury, even though he did not receive salary during his travel.

STATINTL [redacted]

OGC/JJR/MeD
Enclosure:
Memo to D.Comp. fr Audit Div.
dtd 5 May 1951; re. above subj.
Distribution:
Original-Addressee
1-Task Force c/o STATINTL [redacted] with Enclosures-Task Force.
4-Signer
Basic containing 2 cc of memo dtd 5 May listed above; memo dtd 25 May to Personnel Dir. fr Task Force re. Eff. EOD Date of New Overseas Appointees; also, undated memo on same subject to Asst. D.D. fr Task Force w/Amend. to CIA Reg. 20-2.

CR: 322 (Pay & allowances, 1951)